No. 107

IN THE

Supreme Court of the United States

October Term, 1956

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.; *Appellants*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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Appellants, American Trucking Associations, Inc., its Regular Common Carrier Conference, Iowa-Nebraska Transportation Company, Des Moines Transportation Company, Inc., Bruce Motor Freight, Inc., Western Transportation Company, McCoy Truck Lines, Inc., Brady Transfer and Storage Company, Motor Cargo, Inc., Gateway Transportation Company, and Bos Truck Lines, Inc., appeal from the judgment of the United States District Court for the District of Columbia, entered on January 27, 1956, sustaining the order of the Interstate Commerce Commission complained of, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court for the District of Columbia has not been reported, but a copy is attached hereto as Appendix A. A copy of the judgment of the District Court is attached hereto as Appendix B. The report of the Interstate Commerce Commission is reported at 63 M.C.C. 91. The order of the Interstate Commerce Commission has not been reported but is attached hereto as Appendix C.

JURISDICTION

This is an action to suspend, enjoin and set aside the report and order of November 22, 1954, of the defendant, Interstate Commerce Commission, in Docket No. MC-29130 (Sub-No. 70), *The Rock Island Motor Transit Company Common Carrier Application*, pursuant to Section 205(g) of the Interstate Commerce Act, 49 U.S.C. §305(g), Section 10 of the Administrative Procedure Act, 5 U.S.C. §1009, and Sections 1336, 1398, 2284 and 2321 to 2325, inclusive, of the Judicial Code, 28 U. S. C. §§1336, 1398, 2284 and 2321-2325. The judgment of the District Court was entered on January 27, 1956, and notice of appeal was filed in that court on March 23, 1956. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Section 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Contract Steel Carriers, Inc.*, — U.S. —, No. 102, March 12, 1956; *United States* v. *Watson Bros. Transportation Co.*, — U.S. —, No. 490, January 9, 1956; *M. & M. Transportation Company* v. *United States*, 350 U.S. 857, 76 S. Ct. 102.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §1, and Sections 5(2)(a), 5(2)(b), 206, 207, 208(a) and 212 of the Interstate Commerce Act, as amended, 49 U.S.C. §§5(2)(a), 5(2)(b), 306, 307, 308(a) and 312, are set forth verbatim in Appendix D hereof.

QUESTIONS PRESENTED

1. Whether the record before the Interstate Commerce Commission in Docket No. MC-29430 (Sub-No. 70), *The Rock Island Motor Transit Company Common Carrier Application*, fails to support the Commission's report (63 M.C.C. 91) and order of November 22, 1954, authorizing unrestricted motor-carrier operations by the Rock Island Motor Transit Company, a wholly-owned subsidiary of the Chicago, Rock Island and Pacific Railroad Company, between the points directly involved, as well as between points throughout a much broader territory not directly involved in the proceeding before the Commission?

2. Whether the Interstate Commerce Commission, after authorizing the performance of restricted motor-carrier service by a railroad affiliate over routes acquired by purchase under Section 5 of the Interstate Commerce Act (49 U. S. C. §5) lacks the power to void such restrictions and authorize the performance of an unlimited motor-carrier service over the same routes through approval of an application subsequently filed by the same rail affiliate under Section 207 of the Interstate Commerce Act (49 U. S. C. §307)?

3. Whether, in any event, the Interstate Commerce Commission, in authorizing the performance of motor-carrier service by railroads or their affiliates, is required

by the provisions of the Interstate Commerce Act and the National Transportation Policy to limit the motor service to be rendered to that which is auxiliary to or supplemental of the rail service of the parent railroad?

The second question stated was dealt with in complete detail, both in brief and on oral argument before the District Court, by counsel for the rail labor groups, intervening plaintiffs below. As they can be expected to develop it fully before this Court, these appellants will not further treat with it herein.

STATEMENT

This is the first case, in the more than twenty years of federal regulation of motor carriers, in which the Supreme Court has been called upon to determine the perimeter of the Commission's power to authorize the performance of unlimited truck service by a railroad or its subsidiary. In all previous cases, with unimportant exceptions, the Commission has restricted the authority granted in order to assure that the motor service rendered would be limited to operations auxiliary to, or supplemental of, the train service of the railroad. The case at bar represents, for the first time, a complete abandonment by the Commission of all effort to protect the public interest in an independent motor-carrier industry through the imposition of restrictions upon rail operation of motor vehicles. And in so doing, as will be more fully developed later, the Commission has abruptly reversed its interpretation of the statutory safeguards enacted by Congress to assure the continued development and preserve the inherent advantages of an independent motor-carrier system. This violation of Congressional policy creates the novel question here presented. Not only does it do violence to the Commission's consistent interpretation, but it overrules what this Court decided, at least inferen-

tially, in the *Rock Island* and *Texas and Pacific* cases, *infra*.

Commission Approves Purchase of White Line for Restricted Operations.

The controversy herein can be said to have originated almost twenty years ago, when the Chicago, Rock Island and Pacific Railroad Company, a common carrier by railroad subject to part I of the Interstate Commerce Act, 49 U. S. C. §1 *et seq.*, hereinafter called the railroad, became interested in conducting motor-carrier operations paralleling its lines between Chicago, Illinois, and Omaha, Nebraska. Through a subsidiary company, The Rock Island Motor Transit Company, hereinafter called Motor Transit, the railroad on October 13, 1937, filed an application with the Interstate Commerce Commission for authority under Section 213 (now Section 5 of the Interstate Commerce Act, 49 U. S. C. §5) to purchase certain operating rights and property of White Line Motor Freight Company, Inc., and White Line Trucking Company, motor carriers of property subject to part II of the Act, 49 U.S.C. §301 *et seq.*, hereinafter collectively called White Lines. In its report conditionally approving the purchase, *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 5 M.C.C. 451, dated April 1, 1938, the Commission, Division 5, after referring to the considerable testimony that had been offered to show how the correlation of truck-and-rail service over the routes would be effected, found, as required by statute (formerly §213, now §5(2)(b)), that the purchase would promote the public interest by enabling the railroad to use service by motor vehicle to public advantage in its operations and would not unduly restrain competition. Nevertheless the Commission expressly conditioned the authority granted "to such further limitations, restrictions, or modifications as we may find it necessary to impose or make in order to insure that service shall be auxiliary

or supplementary to train service of the railroad and shall not unduly restrain competition." Id., at 5 M.C.C. 458. The certificate, authorizing operations between Silvis, Illinois, and Omaha, Nebraska, and containing the foregoing reservation, was issued to Motor Transit on December 3, 1941.

Commission Approves Purchase of Frederickson for Unrestricted Operations.

Subsequently, on November 28, 1944, in *Rock Island M. Transit Co.—Purchase—Frederickson*, 39 M.C.C. 824, the Commission, Division 4, approved the purchase by Motor Transit of motor-carrier operating rights between Atlantic, Iowa, an intermediate point on the White Lines route, and Omaha, that would permit future truck operations by Motor Transit to follow the line of the railroad much more closely than had the previously-acquired routes. However, the report did not confine Motor Transit to auxiliary and supplemental service. Because of the inconsistency of having truck operations over one route restricted and those over an alternate route unrestricted, the Commission, on February 5, 1945, before the Frederickson certificate was issued, ordered both finance proceedings and the applicable compliance docket reopened for reconsideration.

Commission Reconsiders Both Cases and Restricts Combined Operations.

The Commission on reconsideration issued a comprehensive report, *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457, dated March 4, 1946, wherein it found that the White Lines certificate should be amended and the Frederickson certificate restricted so as to require that all future operations conducted thereunder should be subject to five express conditions insuring auxiliary and supplemental service. Following this re-

port Motor Transit petitioned for reconsideration, and on June 9, 1947, the Commission reopened the proceedings for further hearing. The report of the Commission on further hearing, *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 53 M.C.C. 567, dated April 11, 1949, affirmed the prior report, including the imposition of the auxiliary and supplemental restrictions.

District Court Invalidates Restrictions.

Thereupon Motor Transit filed a complaint in the U. S. District Court for the Northern District of Illinois, Eastern Division, to have the Commission's orders set aside. In *Rock Island Motor Transit Co. v. United States*, 90 F. Supp. 516, decided November 29, 1949, the three-judge court held, *inter alia*, that the imposition of the auxiliary and supplemental restrictions constituted a partial revocation of the operating rights acquired by Motor Transit and of the certificates evidencing such rights. As the procedures for the revocation of certificates prescribed by Section 212(a) of the Act, 49 U.S.C. §312(a), had not been followed, the court said, the relief sought should be granted.

Supreme Court Upholds Restrictions.

On appeal the Supreme Court reversed the decision of the District Court and sustained the Commission's imposition of the auxiliary and supplemental restrictions. The Court in its decision of February 26, 1951, in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 71 S. Ct. 382, held that the modification of the White Lines certificate by the addition of the specific auxiliary and supplemental restrictions was not a partial revocation within the meaning of Section 212(a) and that, until the Frederickson certificate actually had been issued, the Commission could condition it in whatever manner it deemed necessary. The Court agreed with the Commis-

sion that, under the circumstances, it was required to restrict the motor carrier operating rights acquired pursuant to the provisions of Section 213 to the rendition of service auxiliary to, and supplemental of, the rail service of the railroad. Rehearing was denied by the Supreme Court on April 9, 1951. *United States* v. *Rock Island Motor Transit Co.*, 341 U. S. 906, 71 S. Ct. 609.

Commission Grants Temporary, then Permanent, Unrestricted Rights.

The certificate with the auxiliary and supplemental restrictions attached was issued to Motor Transit on September 11, 1951.[1] In the meantime, however, Motor Transit had applied for and had been granted temporary authority under Section 210a of the Interstate Commerce Act, 49 U. S. C. 310a, to operate over virtually identical routes to those it had acquired through the White Lines and Frederickson purchases under somewhat less re-

[1] The certificate was limited by the following restrictions:

1. The service to be performed by The Rock Island Motor Transit Company shall be limited to service which is auxiliary to, or supplemental of, train service of The Chicago, Rock Island and Pacific Railway Company.

2. The Rock Island Motor Transit Company shall not render any service to, or from, or interchange traffic at any point not a station on the rail line of The Chicago, Rock Island and Pacific Railway Company.

3. No shipments shall be transported by The Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebr., Des Moines, Iowa, and collectively Davenport and Bettendorf, Iowa, and Rock Island, Moline, and East Moline, Ill.

4. All contractual arrangements between the Rock Island Motor Transit Company and The Chicago, Rock Island and Pacific Railway Company shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as we, in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service.

strictive conditions than those contained in the certificate issued September 11, 1951.[2] On October 26, 1951, Motor Transit filed an application under Section 207 (49 U. S. C. 307) for permanent authority to perform unrestricted motor carrier operations over the pertinent routes. Hearings were held in this proceeding, docketed as No. 29130 (Sub-No. 70), on March 18 through April 21, 1952, and on May 20, 21, and 22, 1952, at Des Moines, Iowa. Almost a year later, on April 21, 1953, the examiner's recommended report and order was served upon the parties. After the filing of exceptions and replies thereto oral argument was had before the Commission on March 8, 1954. By its report and order of November 22, 1954, in *The Rock Island Motor Transit Company Common Carrier Application*, 63 M. C. C. 91, complained of herein, the Commission granted Motor Transit's Section 207 application, finding that the present and future public convenience and necessity required Motor Transit's operations between Silvis and Omaha free of any auxiliary and supplemental restrictions. The appellants herein, protestants and interveners in the Commission proceeding, on February 16, 1955, petitioned the Commission for reconsideration of its report, and Motor Transit and interveners in its behalf resisted. The petition for reconsideration was denied by order of the Commission dated July 6, 1955, served July 14, 1955, corrected copy served July 27, 1955.

District Court Upholds Commission's Grant.

Appellants, plaintiffs below, filed their complaint in the District Court on July 20, 1955. The case was heard by the District Court on December 15, 1955. The opinion was rendered January 11, 1956, and the judgment, January 27, 1956. The notice of appeal was filed March 23, 1956.

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[2] The temporary authority was limited to shipments of 2,000 pounds (later increased to 5,000 pounds), and certain key-point restrictions were imposed.

THE QUESTIONS ARE SUBSTANTIAL

Scope of Review Admittedly Limited.

The task of the courts in reviewing determinations of an administrative agency, as in the instant case the Interstate Commerce Commission, is acknowledged to be a limited one. *I.C.C.* v. *Mechling*, 330 U. S. 567, 574, 67 S. Ct. 894, 898. The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 287, 54 S. Ct. 692, 694. It is not for the court to weigh the evidence introduced before the Commission or to inquire into the soundness of the reasoning by which its conclusions are reached; these are matters left by Congress to the Commission. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 482, 62 S. Ct. 722, 726; *Assigned Car Cases*, 274 U. S. 564, 580, 47 S. Ct. 727, 733. But Congress has placed limits on the Commission's statutory powers and it is the duty of the courts on judicial review to determine those limits. *East Texas Motor Freight Lines, Inc., et al.* v. *Frozen Food Express, et al.*, — U. S. —Nos. 162-164, April 23, 1956.

Here, Evidentiary Support Was Lacking.

Thus while appellants disagree with the ultimate finding by the Interstate Commerce Commission that the public convenience and necessity require the proposed motor common carrier operations of The Rock Island Motor Transit Company, they concede that there was sufficient evidence of record to enable the District Court to sustain the Commission's order insofar as it authorized a bona fide auxiliary and supplemental service to be rendered to and from such relatively minor points as Brooklyn, Colfax, Marengo, Newton, Oxford, Victor, Walcott and Wilton Junction. However, to the extent that the Com-

mission's order finds that unrestricted service by Motor Transit between such major points as Davenport, Cedar Rapids, Des Moines, Council Bluffs and Omaha is required by the public convenience and necessity, appellants contend that the District Court erred in failing to set aside the Commission's order for want of evidentiary support. In short, it is appellants' position that while the record before the Commission supports a grant of auxiliary and supplemental authority such as that embodied in the restricted certificate issued to Motor Transit on September 11, 1951, under which it has never conducted operations, it supports no more. Findings of the Interstate Commerce Commission of the existence of public convenience and necessity not supported by evidence must be set aside. *Interstate Common Carrier Council* v. *United States*, 84 F. Supp. 414, 422, affirmed *per curiam*, 338 U. S. 843, 70 S. Ct. 91.

Public Convenience and Necesity Must be Proved.

Under Section 206(a)(1) of the Interstate Commerce Act, 49 U.S.C. §306(a)(1) no common carrier by motor vehicle subject to the Act may operate on the highways without a certificate of public convenience and necessity. Section 207, 49 U.S.C. §307, provides for the issuance of the certificate on application if the proposed service "is or will be required by the present or future public convenience and necessity." A finding of public convenience and necessity was made by the Commission, 63 M.C.C. 108, but that ultimate finding must have been based on the proper statutory criteria and must have had the necessary factual findings to support it, *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 64, 65 S. Ct. 1490, 1492. The term "public convenience and necessity" as used in the Act is not defined by the statute, and the difficulty of laying down any general rule by which it can be determined whether or not certificates of public convenience and necessity should be issued long has been

recognized. *Cf. San Antonio & A.P. Ry. Co. Construction*, 111 I.C.C. 483, 493. The purpose underlying the requirement of a finding of public convenience and necessity was said by the Supreme Court in *Texas & N.O.R. Co.* v. *Northside Belt Ry. Co.*, 276 U.S. 475, 479, 48 S. Ct. 361, 362, to be "to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest." This statement of general purpose has been refined into a policy of the Interstate Commerce Commission of fostering sound economic conditions in the motor carrier industry by according existing motor carriers the right to transport all traffic which they can handle adequately, efficiently and economically in the territories served by them. *Clark, Callahan, Inc.*, 41 M.C.C. 693, 706; *Gabler Common Carrier Application*, 21 M.C.C. 743; *C & D Oil Co., Contract Carrier Application*, 1 M.C.C. 329, 332. As the three-judge court said in *Hudson Transit Lines* v. *United States*, 82 F. Supp. 153, 157, affirmed *per curiam*, 338 U.S. 802, 70 S. Ct. 59:

> The Commission has frequently held that under §207 of the Act, 49 U.S.C.A. §307, there must be an affirmative showing not only that a common carrier service is required in the convenience of the public but also that it is a necessity, and that the latter element includes a showing that present facilities are inadequate. Pan-American Bus Lines Operation, 1 M.C.C. 190, 203; Bluenose Bus Co. Ltd., Common Carrier Application, 1 M.C.C. 173, 176; Richard L. Richards, Extension of Operations, 6 M.C.C. 80, 81; Ohio Transportation Co., Common Carrier Application, 29 M.C.C. 513, 520; Royal Cadillac Service, Inc., Common Carrier Application, 43 M.C.C. 247, 259. The courts, too, have recognized inadequacy of existing facilities as a basic ingredient in the determination of public "necessity". Inland Motor Freight v. United

States, D. C. E. D. Wash. 60 F. Supp. 520, 524. See also Interstate Commerce Commission v. Parker, 326 U.S. 60, 69, 70, 74, 65 S. Ct. 1490, 89 L. Ed. 2051 and dissenting opinion of Mr. Justice Douglas. This does not mean that the holder of a certificate is entitled to immunity from competition under any and all circumstances. Chesapeake & O. R. Co. v. United States, 283 U.S. 35, 51 S. Ct. 337, 75 L. Ed. 824. The introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service without being unduly prejudicial to the existing service. Interstate Commerce Commission v. Parker, supra. No such finding has here been made, nor is there any evidence to support such a finding.

No Evidence of Service Need at Larger Points.

In the instant proceeding the record lends no support to a finding that the public convenience and necessity require the service of Motor Transit between the major points referred to. Witness after witness testifying in support of the application by Motor Transit acknowledged that there was no need for such service. For example, Judge Carl Reed, Chairman of the Iowa State Commerce Commission, testified that service to the larger communities such as Davenport, Des Moines and Omaha was adequate, and that his Commission had no complaints regarding service to such points (R. 783). Similar acknowledgements were made by virtually each of the shipper and Chamber of Commerce witnesses. In short, out of the multitude of more than 150 witnesses offered by Motor Transit in support of its application not one gave the slightest indication of a need for this type of service.

In summation, there is no evidence in the record to buttress a finding of public need for additional service at the larger points. Any conclusion reached by the Commission that there is a public need for more motor carrier service at such points is not supported by basic facts

and, on the contrary, is actually refuted by the testimony of witnesses testifying on behalf of Motor Transit.

Commission Lacks Power to Grant Rights Here Conferred.

Even if the ultimate finding of public convenience and necessity had been sustained by basic facts, the issuance by the Interstate Commerce Commission of the order authorizing unrestricted motor-carrier operations by Motor Transit nevertheless would constitute reversible error as an unlawful attempt to circumvent the limitation of Section 5(2)(b) of the Act. That section, formerly Section 213 of the Motor Carrier Act, denied discretion to the Commission to approve a proposed acquisition of a motor carrier by a railroad except upon a finding that the transaction would promote the public interest, would enable the acquiring carrier to use service by motor vehicle to public advantage in its operations, and would not unduly restrain competition.

The Commission, heeding the clear intent of Congress, was quick to recognize that it could not give the railroads free opportunity to go into the kind of truck service which was strictly competitive with, rather than auxiliary to, their rail operations. In *Pennsylvania Truck Lines, Inc.—Control—Barker,* 1 M.C.C. 101, an acquisition proceeding under Section 213, the Commission declared that for railroads or their subsidiaries seeking to perform motor-carrier service, only those operations which were auxiliary to or supplemental of train service, could be approved. That construction since has been followed by the Commission.

In the instant proceeding, as stated earlier herein, the Supreme Court, when the case previously was before it, sustained the Interstate Commerce Commission's imposition of restrictions upon the motor-carrier operating rights acquired by Motor Transit, a railroad subsidiary,

in the White Lines and Frederickson purchases so as to insure that the acquired rights would be available solely for the rendition of auxiliary and supplemental service. By the order complained of the Commission would permit Motor Transit to operate without limitation over the identical routes acquired in the White Lines and Frederickson purchases and to serve the very same points. Moreover, unlike the earlier grant, the present award would enable Motor Transit to conduct operations unrelated to and independent of the rail service of the parent railroad company and in competition with that rail service as well as the service of independent motor carriers.

Appellants maintain that, irrespective of whether the grant of motor-carrier authority to a railroad or its subsidiary is based on an application filed under Section 5(2)(b) or Section 207, the Interstate Commerce Commission is without power to authorize the performance by such a railroad or subsidiary of unrestricted motor carrier service entirely divorced from the operations of the railroad and in direct competition with the service afforded by independent motor carriers and, indeed, the railroad itself. As the Interstate Commerce Commission and the government, in their joint brief filed in the Supreme Court in *United States* v. *Texas and Pacific Motor Transport Co.* so aptly said:[3]

> To be sure, section 207 does not contain a provision like that in section 213 (now sec. 5), imposing restrictions and requiring special findings in instances where the applicants are railroad subsidiaries. But that section does preclude the Commission from granting a certificate of operating authority unless it is able to find that the proposed operations are required by public convenience and neces-

[3] Nos. 38 and 39, October, 1950, term. See pp. 53-55 of joint ICC-government brief.

sity; and, in instances of applications by railroad subsidiaries, the Commission, in the practical administration of section 207, is confronted with substantially identical obstacles and problems as in cases of applications by railroad subsidiaries under section 213. Like Section 1 (18), which forbids the railroads from extending their lines unless authorized by the Commission based on findings that the extension is required by public convenience and necessity, section 207 was enacted by Congress to enable the Commission to control and prevent wasteful competition and destructive competitive practices. Although section 213 (now sec. 5) deals with the acquisition of existing motor carrier operations, which, as acquired by railroad subsidiaries, would presumably be taken out of the field of independent existing competition, nevertheless, the purposes of Congress' transportation policy, declared when enacting the Motor Carrier Act, refute any inference that Congress, while closing the door to railroad suppression of motor carrier competition by means of acquiring through a subsidiary existing motor carrier operations, at the same time left open the unfettered opportunity to do the same thing by means of obtaining through a subsidiary authority to institute new motor carrier operations. So far as opportunity for suppression of competition is concerned, there is little difference, particularly in the motor carrier field, between the opportunity afforded through the control by a railroad of an already existing motor carrier and that afforded by control of one newly created.

Commission Has Consistently Recognized Its Lack of Power.

While Section 207 of the Motor Carrier Act, regulating the extension of existing motor-carrier operations, contained no express limitation upon railroad participation in truck transportation as did Section 213, the Interstate Commerce Commission, as noted, has consistently acknowledged that it was required to read the Act as a

whole and to apply the policy reflected by the wording of Section 213 in interpreting and applying the provisions of Section 207. In *Kansas City S. Transport Co., Inc., Common Carrier Application*, 10 M.C.C. 221, an application proceeding under Section 207, the Commission relied on the principles and criteria of the *Barker* case and subjected the motor-carrier authority granted to the rail applicant to five conditions[4] intended to insure that the authorized operations would be auxiliary and supplemental to the train service of the railroad.

Thereafter in virtually every acquisitions proceeding under Section 213 and every application proceeding under Section 207 the Commission limited the motor authority granted to a railroad or its affiliate by the imposition of auxiliary and supplemental restrictions. The Commission's construction of the Act, as indicated by the *Barker* and *Kansas City Southern* cases, was called to the attention of Congress, which by the Transportation Act of 1940, 54 Stat. 919, *et seq.*, reenacted the pertinent sections in virtually identical form, thereby impliedly ratifying the Commission's prior construction.

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[4] 1. The service to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, rail service of the Kansas City Southern Railway Company or the Arkansas Western Railway, hereinafter called the railways.

2. Applicant shall not serve, or interchange traffic at, any point not a station on a rail line of the railways.

3. Shipments transported by applicant shall be limited to those which it receives from or delivers to either one of the railways under a through bill of lading covering, in addition to movement by applicant, a prior or subsequent movement by rail.

4. All contractual arrangements between applicant and the railways shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as we, in the future, may find it necessary to impose in order to restrict applicant's operations to service which is auxiliary to, or supplemental of, rail service. (10 M.C.C. 240)

This Court Has Recognized Commisison's Lack of Power.

The question of the Commission's construction of the pertinent provisions of the Act was before the Supreme Court in the *Rock Island* case, *supra*, and *United States* v. *Texas & Pacific Motor Transport Co.*, 340 U.S. 450, 71 S. Ct. 422. The former was an appeal from a lower court decision setting aside an order of the Commission imposing auxiliary and supplemental restrictions on the authority to operate trucks over the identical routes involved in the instant proceeding, acquired by Motor Transit by purchase from independent motor carriers. In its report, 40 M.C.C. 457, the Commission comprehensively reviewed the legislation, its history and the Commission's construction thereof and concluded, *inter alia*, that the accomplishment of the purposes forming the National Transportation Policy, 49 U.S.C. preceding § 1, *required* that grants to railroads or their affiliates of authority to operate as common carriers by motor vehicle or to acquire such authority by purchase or otherwise should be so conditioned as definitely to limit the future service by motor vehicle to that which is auxiliary to, or supplemental of, train service.

In its brief to the Supreme Court containing the legal argument applicable to both the *Rock Island* and *Texas & Pacific* cases, the Commission, joined by the United States, said that the first prerequisite to Commission approval is that the service by motor vehicle be for use by the railroad in its operations. If the operations of the motor-carrier subsidiary were not a part of the railroad's operations at all, the Commission would not be able to make a determination as to the further prerequisites that the operations would promote the public interest and would not unduly restrain competition.[5]

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[5] Footnote 13, pp. 52-53 of joint I.C.C.-Government brief.

The Supreme Court concurred, sustaining the Commission's construction that the National Transportation Policy requires that motor-carrier operations of railroads and their affiliates be auxiliary to and supplemental of train service. The Court approved the Commission's reading into Section 207 the requirements of Section 5(2)(b) (formerly part of Section 213), thus assuring a consistent attitude toward the use of motor carriers by railroads. Following the Court's decisions in the *Rock Island* and *Texas & Pacific* cases and referring thereto the Commision announced that legislation was required if there is a need in the public interest for more liberal treatment of the railroads in their endeavors to conduct motor-carrier operations not auxiliary or supplemental of train service. No such legislation, although continually recommended for enactment by the railroads, has been forthcoming.

The Commission would rationalize its grant of unrestricted authority to Motor Transit by the mere assertion that the evidence justified an exception to the policy of the *Kansas City Southern* case, 63 M.C.C. 108. However, in that proceeding the Commission recognized that the language of Section 213 (now Section 5) showed that Congress had not been convinced that the railroads should be given "free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations." 10 M.C.C. 237. No exception to that policy of Congress is permissible as none was provided by Congress itself. True, the Commission in the past has attempted to find exceptional circumstances which would permit a departure from the policy of the *Kansas City Southern* case. These actions by the Commission were taken largely in proceedings that were uncontested, and none is known to have been challenged in court and sustained. However, even if these Commission proceedings constituted valid precedent

for departures, under exceptional circumstances, from the well-established policy of restricting railroad truck operations, that line of Commission cases is clearly distinguishable from the instant case.

The Division 5 report upon which defendants and supporting interveners placed such great reliance below, *St. Andrews Bay Transp. Co. Extension of Operations*, 3 M.C.C. 711, amply illustrates the cleavage that separates the instant case from those proceedings in which the Commission has attempted to fashion an "exceptional circumstances" doctrine. There the railroad subsidiary sought authority to operate between Dothan, Ala., with a population of 17,000, and Columbus, Ga., with a population of 53,000, a distance of 120 miles. Only one motor carrier who lacked direct authority to serve most of the points protested the proposed operation, and there was testimony that no common-carrier truck service had been maintained between the terminal and intermediate points. The decision, which preceded the Commission's order in the *Kansas City Southern* case, that in effect overruled it, was never passed upon either by the entire Commission or the courts.

The Commission's Decision Constitutes a Departure from the Statute.

The Commission's report and order complained of herein, unless set aside, would confer upon Motor Transit a broad grant of authority to conduct motor-carrier operations not auxiliary to or supplemental of train service. In the area directly involved comprising a total of approximately 500 miles of routes, serving such important points as Chicago, DesMoines, Cedar Rapids and Omaha, the proposed operations would constitute a complete departure from the type of service contemplated by the statute and heretofore authorized by the Commission.

Further, the record before the Commission makes it clear that the railroad subsidiary, by "tacking" the authority granted by the Commission to authority already held, would be able to perform completely unrestricted motor-carrier service over a much broader area than that directly involved in the proceeding before the Commission, including, for example, service between such important points as the Twin Cities and Kansas City. This without a scintilla of evidence in the record before the Commission of any need for such additional motor-carrier service and in the teeth of the Commission's holding, at an earlier stage of this same proceeding, that a railroad applicant for motor-carrier operating authority "has a special burden, not by reason of any attitude or action on our part, but by reason of the very circumstance that it is a railroad."[6]

Whether it be viewed as lifting of auxiliary and supplemental restrictions imposed on motor carrier operating authority previously acquired by purchase or as a grant of new authority not subject to auxiliary and supplemental restrictions, the Commission's report and order complained of herein violates the letter and the spirit of the law, to wit, the National Transportation Policy and Sections 5(2)(b) and 207 of the Interstate Commerce Act, and is contrary to the decisions of the Commission and the Supreme Court. The report and order ignores completely the first prerequisite to Commission approval that the service by motor vehicle be for use by the parent railroad *in its operations*. It pays lip service only to the further prerequisite, which it could not validly reach, that the proposed operation is in furtherance of the public interest and will not unduly restrain competition. However, even assuming the Commission had been able to

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[6] *Rock. Island Mtr. Transit Co.—Purchase—White Line M. Frt., supra*, at 40 M. C. C. 474. Report of the entire Commission on reconsideration.

make the necessary findings, the only operations that could be approved nevertheless would be auxiliary and supplemental operations, and the Commission would be required, as it is in the case of every grant to a railroad or to a railroad affiliate of authority to operate as a common carrier by motor vehicle or to acquire such authority by purchase or otherwise, to condition the authority so as definitely to limit future service by motor vehicle to that which is auxiliary to, or supplemental of, train service.

The import of the Commission's grant of unrestricted motor-carrier authority to Motor Transit far transcends consideration of the immediate needs of the shippers and receivers of freight in the affected area, the willingness and ability of the existing motor carriers to satisfy that need, or the impact of the added competition of a railroad sustained, State-protected subsidiary motor carrier.[7] Being the first case involving an attempt to award unrestricted motor rights of such magnitude to a railroad

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[7] Motor Transit is the only motor carrier with intrastate authority to operate over U. S. Highway 6 between the Iowa points involved herein. This intrastate monopoly, conferred by the Iowa State Commerce Commission, enables Motor Transit to transport in the same vehicle combined loads of interstate and intrastate traffic to and from the small Iowa points, much more economically than can the independent motor carriers which are denied the right to transport intrastate freight. The Commission, clearly aware of this, nevertheless subordinated its duty, set forth in the *Parker* case, to guard against a transportation monopoly, in favor of Iowa's policy directly to the contrary, by authorizing Motor Transit to handle interstate traffic to and from the same small Iowa points with no restrictions imposed. If the Commission's decision is allowed to stand, the Iowa intrastate monopoly granted Motor Transit will inevitably ripen into a complete monopoly, both of inter- and intrastate freight. This is bad enough in itself, but the Commission grossly compounds its error by allowing Motor Transit to conduct unrestricted operation between major cities throughout the parent railroad's system, in Iowa and elsewhere, despite the absence of a shred of record evidence to support a need for such service.

or its subsidiary, this proceeding presents the basic question of the proper relationship between the rails and the trucks. Is the one mode of transportation to continue the measure of independence of the control of the other that has existed in the past? Is an independent motor carrier industry, contemplated by the National Transportation Policy and the Interstate Commerce Act to be supplanted, through Commission fiat, by fully integrated transportation rendered by the railroads and their wholly-owned subsidiaries?

The Interstate Commerce Commission from the time of the *Barker* decision until its order complained of herein has recognized its duty of confining motor-carrier operations of railroads or their subsidiaries to service auxiliary to, and supplemental of, their rail service. In accordance with the Congressional mandate it has sought to maintain the integrity of the independent motor-carrier industry. To be sure, appellants believe the Commission has been altogether too generous in authorizing the railroads to engage in over-the-road trucking operations in the performance of so-called auxiliary and supplemental service. It has seemed to gloss over the statutory requirements that the railroads establish that their acquisition of existing motor-carrier operating authority is in the public interest (Section 5(2)(b)) or that their inauguration of a new motor-vehicular operation is required by the public convenience and necessity (Section 207). Instead, it has permitted railroads to operate intercity trucks in feeder service and service in substitution for way freight trains upon a mere showing that the railroads thereby could achieve certain economies; the Commission's decisions "construe the statute as if 'railroad convenience and necessity' rather than 'public convenience and necessity' were the standard." Mr. Justice Douglas, dissenting in the *Parker* case, *supra*, at 326 U.S. 74, 65 S. Ct. 1497. But even though its standard of pub-

lic need in the case of rail applications to perform truck service has been different (and much easier to satisfy) than has been the case in connection with applications by independent motor carriers, nevertheless the Commission has never heretofore authorized a railroad to conduct unrestricted trucking operations virtually paralleling its lines throughout its entire system.

By the departure from its policy that the decision herein represents the Interstate Commerce Commission would permit the compete integration of truck and rail transportation. Not confined to operations auxiliary to, and supplemental of, the train service of the parent railroad company, the grant of unrestricted motor-carrier operating authority would enable the railroad subsidiary to compete all out with independent motor carriers and indeed the railroad itself. The subsidiary, relying on the financial and soliciting resources of the parent railroad, would be such a potent competitor that it soon would be able to dominate the field and eventually drive the independent motor carriers from the roads. A motor industry owned or controlled by the railroads certainly was not what Congress had in mind.[8] The appellants here are not objecting to the use of trucks by the railroads in pick-up and delivery services, feeder service or service in substitution for way freight trains. They are, however, objecting to the entry of the railroads into the trucking business through subsidized motor affiliates rendering an unrestricted trucking operation such as would otherwise be rendered by the independent motor

[8] See, for example, the statement of Senator Wheeler, chairman of the Senate Committee on Interstate Commerce, relating to the language now embodied in the proviso of §5(2)(b), that "with this limitation, it will be possible for the Commission to allow acquisitions which will make for coordinated or more economical service and at the same time to protect against the monopolization of highway carriage by rail, express, or other interests." 79 Cong. Rec. 5655, April 15, 1935.

carriers. In short, our objection goes to the fundamental departure from policy which is inherent in the Commission's decision—the complete abandonment of the rule, consistently applied since motor carriers came under federal regulation, that railroad use of motor vehicles must be so tied in with their train operations as to enable the Commission to hold that the motor service authorized is for the purpose of improving the railroad's train service, as distinguished from the performance of a completely independent motor service. Appellants believe that Congress by the enactment of the National Transportation Policy and the provisions of Sections 5(2)(b) and 207 of the Interstate Commerce Act made it abundantly clear that the Commission was not empowered to authorize railroads to perform motor-carrier service completely divorced from their train operations.

The Interstate Commerce Commission by promulgating the order complained of went counter to the Congressional direction and exceeded its lawful authority.

CONCLUSION

For the foregoing reasons it is urged that jurisdiction be noted and that the judgment of the District Court be reversed and the case remanded to the District Court for disposition consistent with the Supreme Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the eighteenth day of May, 1956, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with postage prepaid, to Oliver Gasch, United States Attorney for the District of Columbia, at Room 3600-A, United States Court House, Washington, D. C.; and by mailing a copy in a duly addressed envelope, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope with postage prepaid, to Robert Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the Rock Island Motor Transit Company, Employees' Committee of Rock Island Motor Transit Co., Davenport Chamber of Commerce, et al., and Shippers' Committee, intervening defendants, by mailing copies in a duly addressed envelope, with postage prepaid, to Arthur L. Winn, Jr., Esq., their attorney, at 743 Investment Bldg., Washington, D. C.

4. On the Railway Labor Executives' Association, Brotherhood of Railroad Trainmen, and Order of Railway Conductors and Brakemen, intervening plaintiffs, by mailing copies, in a duly addressed envelope, with postage prepaid, to James L. Highsaw, Jr., their attorney, at 620 Tower Bldg., Washington, D. C.

PETER T. BEARDSLEY

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN TRUCKING
ASSOCIATIONS, INC., et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA
and INTERSTATE COMMERCE
COMMISSION, et al.,
Defendants.

Civil Action No. 3171-55

MEMORANDUM OPINION

Before PRETTYMAN, Circuit Judge, and PINE and HOLTZOFF, District Judges, sitting as a statutory three-judge court.

PRETTYMAN, *Circuit Judge*: The Chicago, Rock Island and Pacific Railroad Company is a through trunk-line railroad operating, so far as is here pertinent, across the State of Iowa from Davenport to Council Bluffs. It owns a subsidiary, called herein "Motor Transit", which owns operating rights and property as a motor carrier on routes paralleling or stemming from the Railroad route. The motor carrier certificates have heretofore contained limitations requiring that the motor service be auxiliary or supplementary to the rail service, but these limitations were stayed and have never been enforced. The motor carrier applied for a certificate without the restrictions. The ap-

plication was opposed by other motor carriers. After extensive proceedings the Interstate Commerce Commission granted the application, subject to the conditions that there might be attached such reasonable terms, conditions and limitations as the public convenience and necessity might require and that all contractual arrangements with the Railroad should be reported to the Commission and be subject to its revision. Petition for reconsideration having been denied, this action to set aside the order was brought by motor carriers operating in the same general area as Motor Transit.

The nub of the controversy is in two parts, (1) whether the Commission has power to grant a certificate to a motor carrier wholly owned by a railroad without a restriction that the service shall be auxiliary or supplementary to the railroad service and (2), if so, whether the findings of the Commission to the effect that the public convenience and necessity justified the grant in the present case were supported by evidence in the record.

Two sections of the Interstate Commerce Act, as now amended, are involved. Section 5(2)(b)[1] provides that, whenever a carrier by railroad, or its subsidiary, is an applicant for approval of a transaction involving a motor carrier, the Commission shall not approve unless it finds, *inter alia*, that the transaction will enable the carrier to use service by motor vehicle to public advantage in its operations. This section governs the acquisition of motor carriers by railroads. Section 207(a) of the Act[2] provides that a certificate shall be issued to any qualified applicant therefore if it is found, *inter alia*, that the proposed service is or will be required by the present or future public convenience and necessity. This latter section (207(a)) does

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[1] Formerly Sec. 213(a)(1), amended Aug. 2, 1949, 63 STAT. 485, 49 U.S.C.A. § 5(2)(b).

[2] As enacted Aug. 9, 1935, 49 STAT. 551, 49 U.S.C.A. § 307(a).

not contain the requirement which appears in the former section (5(2)(b)) that the proposed service must be used in the operation of the railroad if a railroad is the applicant. It is agreed that the requirement that the service be used in the operation of the railroad applicant means that the service must be auxiliary or supplementary to the rail service.

Plaintiffs say that the requirement which appears in Section 5(2)(b) must be read into Section 207(a) and therefore controls in the issuance of certificates where a railroad, or its subsidiary, is the applicant. The Commission says the requirement is notably omitted from the terms of Section 207(a); that the policy, not the terms, of the requirement applies to the issuance of certificates under 207(a). It says a policy requirement is not so rigid as a flat requirement in terms but is flexible and permits a grant in exceptional circumstances where the Commission finds that the public interest, convenience and necessity require the grant.

We agree with the contention of the Commission in the foregoing respect. The case concerns the issuance of a certificate.[3] Certainly the terms of the requirement as to auxiliary and supplementary service do not appear in Section 207(a). It is equally certain that the policy of the requirement, being a basic policy in the statute, does apply. The difference between a rigid requirement and an applicable policy is one of flexibility and permits the Commission to be governed in exceptional circumstances by the needs of the public convenience and necessity.

This brings us to the second main part of the contro-

[3] See Interstate Commerce Comm'n v. Parker, 326 U.S. 60, 89 L.Ed. 2051, 65 S. Ct. 1490 (1945); United States v. Rock Island Co., 340 U.S. 419, 428, 431, 442, 95 L.Ed. 391, 71 S. Ct. 382 (1951); United States v. Texas & Pac. Co., 340 U.S. 450, 95 L.Ed. 509, 71 S.Ct. 422 (1951).

versy. The traffic consists of intrastate traffic, rail originated traffic, and interstate "peddle" traffic. The rail originated traffic goes, through natural course of events, to Motor Transit. That service is largely auxiliary or supplementary to the train service and is not actually involved in the controversy. Certificates for the intrastate traffic are issued by the State of Iowa, and that State follows the usual rule of public utility regulation that where the business makes economically feasible only one carrier it will certificate only one. It has certificated Motor Transit for the intrastate traffic along the routes here involved, and so that traffic is not actually involved in the present controversy. The so-called interstate peddle operation is one in which the motor carrier, starting with a full truckload, moves interstate and distributes that load at various points of destination; or, in reverse, a truck picks up parts of loads at various points of origin and eventually transports interstate a full truckload. This is really the traffic which is involved in the pending case. The Commission found, in effect, that this peddle operation, standing alone, is not a profitable one and that the trend of motor carriers operating in Iowa has been to refrain from rendering this service; that the business communities along the routes need this sort of service; and that Motor Transit, already having rail originated and intrastate traffic, can readily render this additional service. As a matter of fact Motor Transit has operated since its first acquisition in 1938 without the restrictions here in issue. During that period it satisfactorily performed this particular service. Actually the result of sustaining the motor carriers' position would be a privilege to them of giving the service now rendered by Motor Transit if they so desire and refusing to give it when it is economically not feasible. That would not appear to serve the public interest.

We think the position of the Commission is well taken on the evidence. Voluminous testimony was produced. The

findings are extensive. The conclusion that the grant appears necessary in the public interest is well founded. Judgement will be rendered for the defendants.

E. Barrett Prettyman

David A. Pine

Alexander Holtzoff

Dated 1/11/56

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN TRUCKING ASSOCIATIONS, INC. ET AL.,
Plaintiffs

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL.,
Defendants

CIVIL ACTION NO. 3171-55

JUDGMENT

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on December 15, 1955, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consist-

ing of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties; and being fully advised in the premises; and having on January 11, 1956, filed herein its opinion holding that the order of the Interstate Commerce Commission herein assailed is valid and that judgment will be rendered for defendants; now in accordance with the said opinion,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the relief sought herein be, and the same hereby is, denied, and judgment be, and the same hereby is, rendered for the defendants, with costs assessed against the plaintiffs and intervening plaintiffs.

This 27th day of January, 1956.

E. Barrett Prettyman
UNITED STATES CIRCUIT
JUDGE

David A. Pine
UNITED STATES
DISTRICT JUDGE

Alexander Holtzoff
UNITED STATES
DISTRICT JUDGE

Approved as to form:

Fritz R. Kahn
Attorney for
American Trucking Associations, Inc.,
Regular Common Carrier Conference and
Motor Carrier Plaintiffs

James E. Highsaw, Jr.
Attorney for
Railway Labor Executives' Association,
Brotherhood of Railroad Trainmen and
Order of Railway Conductors and Brakemen

APPENDIX C

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 22nd day of November, A. D., 1954.

No. MC-29130 (Sub. No. 70)

THE ROCK ISLAND MOTOR TRANSIT COMPANY COMMON CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, and the Commission, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application, except to the extent granted in said report, be, and is hereby, denied.

By the Commission.

GEORGE W. LAIRD,
Secretary.

(SEAL)

APPENDIX D

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U. S. C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transpor-

tation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * *

COMBINATIONS AND CONSOLIDATIONS OF CARRIERS

SEC. 5. [*As amended August 24, 1912, February 28, 1920, June 10, 1921, June 16; 1933, June 19, 1934, August 9, 1935, September 18, 1940, and August 2, 1949.*] [*49 U. S. C. § 5.*]

* * * * *

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is

not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

* * * * *

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the

meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in it operations and will not unduly restrain compition.

* * * *

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. [*August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950.*] [*49 U.S.C., § 306.*]

(a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commis-

sion as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(2) Unless otherwise specifically indicated in such certificate, the holder of any certificate heretofore issued under this part, or hereafter issued under this part pursuant to an application filed on or before the date on which this paragraph takes effect, authorizing the holder thereof to engage as a common carrier by motor vehicle in the transportation in interstate or foreign commerce of passengers or property over any route or routes or within any territory, may without making application under this section engage, to the same extent and subject to the same terms, conditions, and limitations, as a common carrier by motor vehicle in the transportation

of passengers or property, as the case may be, over such route or routes or within such territory, in commerce between places in the United States and places in Territories or possessions of the United States.

(3) Subject to the provisions of section 210, if any person (or its predecessor in interest) was in bona fide operation on March 1, 1950, over any route or routes or within any territory, as a common carrier engaged in the transportation of passengers or property by motor vehicle in commerce between any place in the United States and any place in a Territory or possession of the United States, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on March 1, 1950, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to interruptions of service over which such applicant or its predecessor in interest had no control, the Commissioner shall issue a certificate authorizing such operations without requiring further proof that public convenience and necessity will be served thereby, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after the date on which this subparagraph takes effect. Pending the determination of any such application, the continuance of such operation without a certificate shall be lawful. Any carrier which, on the date this subparagraph takes effect, is engaged in an operation of the character specified in the foregoing provisions of this subparagraph, but was not engaged in such operation on March 1, 1950, may under such regulations as the Commission shall prescribe, if application for a certificate is made to the Commission within one hundred and twenty days after the date on which this subparagraph takes effect, continue such

operation without a certificate pending the determination of such application in accordance with section 207 (a).

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

ISSUANCE OF CERTIFICATE

SEC. 207. [*August 9, 1935.*] [*49 U.S.C., § 307.*] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other

than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

TERMS AND CONDITIONS OF CERTIFICATE

SEC. 208. [*August 9, 1935.*] [*49 U.S.C., § 308.*] (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

SUSPENSION, CHANGE, REVOCATION, AND TRANSFER OF CERTIFICATES, PERMITS, AND LICENSES

SEC. 212. [*August 9, 1935, amended June 29, 1938, September 18, 1940.*] [*49 U.S.C., § 312.*] (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however*, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder; *And provided further*, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice

of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (e), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commision may prescribe.